Cost-of-service regulation is favored mostly by municipalities that believe their cable rates are too high.[34] If their rates really are too high, any regulatory model should suffice to bring basic service rates back into line. There is no need to impose the complexities and frailties of cost-of-service regulation in order to achieve this result.

As many commenters have pointed out, cost-of-service is a costly and inefficient way to regulate, and cost-of-service showings are suitable only for exceptional cases.[35] The Commission and other regulators have long been shifting their regulation even of traditional utilities away from cost-of-service principles, and this trend has accelerated in recent years.[36] Ironically, while some municipalities advocate cost-of-service regulation, NATOA, the association of the

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34/ *See, e.g.*, Comments of The Municipal Franchising Authorities ("Municipalities") at 3-4, 9-10. Many of the same parties favoring cost-of-service regulation also argue that the Commission must regulate basic rates even if the franchising authority does not choose to seek certification, partly because they do not believe that franchising authorities will be able to shoulder the administrative burden of regulation. *See, e.g., id.* at 5-7. In other words, these franchising authorities favor the most complex and costly form of regulation, but want the Commission to bear the burden of implementing it.

35/ *See* Comments of CVI at 12-14, Comments of Adelphia at 46-51.

36/ *See AT&T Price Cap Order;* Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order,* 5 FCC Rcd 6786 (1990) (adopting price caps for LECs). Even when the *AT&T Price Cap Order* was adopted, 20 states had adopted some form of incentive regulation for AT&T and many had begun to consider incentive regulation for LECs. *AT&T Price Cap Order,* 4 FCC Rcd at 2927, 2930. Today most states, recognizing the flaws of the old regulatory regime, have abandoned traditional rate of return regulation. *See* State Telephone Regulation Report, Jan. 30, 1992 at 1; State Telephone Regulation Report, Feb. 13, 1992 at 1 (surveys of state regulation of telephone companies).

municipal telecommunications officers most likely to implement the Commission's regulatory regime, opposes the use of cost-of-service regulation.[37]

Cost-of-service regulation is particularly unsuited for cable operators. Unlike telephone companies, which have long been subject to special regulatory accounting rules, cable operators and cable regulators would have to start from scratch to design an appropriate cost-of-service regulatory regime. In particular, the telephone model cannot be adapted to cable because the industries are very different. There is no correspondence between, for instance, cable operators' programming and marketing costs and any of the costs facing regulated telephone operations. The differences in the way telephone and cable networks are designed, constructed and operated are also enormous, making any effort to apply existing telephone cost-of-service rules to cable futile.[38] In addition, cost-of-service regulation historically is applied only to essential services. There is no warrant for applying it to a luxury like cable service.

Price caps are similarly unsuited to basic rate regulation. The premise behind price cap regulation is that changes in rates should be limited by a specific formula in order to assure that they are reasonable. For instance, BellSouth proposes a price cap formula that would permit increases for inflation

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37/ Comments of NATOA at 44.

38/ These important differences demonstrate that the suggestion of telephone companies that there should be few distinctions between cable and telephone regulation are meritless. *See* Comments of BellSouth Telecommunications Inc. ("BellSouth") at 10-11.

and reduce rates for a productivity factor.[39/] This approach would have the perverse effect of penalizing cable operators that have not raised their rates since deregulation by limiting them to small price increases, even though their past behavior demonstrates that they act responsibly. Ironically, price caps also would permit cable operators with high rates the same percentage increases as those with low rates. Just as the absurdity of this result requires the Commission to reject banding, it also requires the Commission to reject price caps.[40/] The Commission also should reject price caps because price caps require the examination of each cable operators' rates at the outset of the regulatory process, something that benchmarking avoids.[41/]

39/ *Id.* at 11-12.

40/ *See* Comments of CVI at 25-27.

41/ One other proposal merits brief comment. CFA suggests that the Commission should adopt a "benchmark" derived by applying an inflation adjustment to each cable system's 1984 or 1986 rates, without regard for any increases in channels, and should then apply the identical benchmark to both basic services and cable programming services. Comments of CFA at 88-91. The net effect of this approach, based on CFA's own figures, would be to reduce average cable rates by 35.75 percent if 1984 rates are used. CFA states that this decrease would be the equivalent of a "productivity adjustment," although it provides no evidence that cable productivity over that eight year period exceeded nationwide productivity by anything close to the nearly 5.4 percent a year that this figure would require. Equally important, CFA's approach clearly is intended to reduce most, if not all cable rates, despite Congress' intent to reach only a minority of cable operators, especially for cable programming services. CFA also provides no explanation of how its regulatory regime would be applied to cable systems that were not in operation in either 1984 or 1986.

III. THE METHODOLOGY FOR CABLE PROGRAMMING SERVICE REGULATION

The Commission must be careful to separate its consideration of basic services and its consideration of cable programming services. Under the 1992 Act, different standards apply to each of these kinds of service. While a benchmarking regime is still appropriate, it must be adapted to the special concerns of cable programming service.

A. The Difference in Standards Between Basic Service and Cable Programming Service Rate Regulation Is Embodied in the 1992 Act.

Some parties, determined that all cable rates should be pervasively regulated, argue that the Commission should treat basic service and cable programming service identically.[42] That is not, however, what Congress intended or what the 1992 Act says.

CFA, for instance, states that "reasonable and unreasonable are two sides of the same coin."[43] This may be a clever logical construct, but it should not obscure the difference in how Congress expected regulation of basic and cable programming services to unfold. Congress did not have to choose the word "unreasonable;" after all, "reasonable" already had been used to describe rates for basic service.[44] The specific decision to base the standard for regulation of cable

42/ *See* Comments of CFA at 89, n.88, Comments of NATOA at 70.

43/ Comments of CFA at 82.

44/ *Compare* 47 U.S.C. § 543(b)(1) *with* 47 U.S.C. §§ 543(c)(1)(A), (2).

programming services on whether the rates were unreasonable was, instead, a recognition that cable programming services are subject to more competition than basic services and that undue regulation would harm cable programming services. The difference between "reasonable," the basic rate standard, and "unreasonable," the cable programming rate standard, is meant to convey that Congress did not intend for cable programming service rates to be subject to the same kind of scrutiny as basic service rates.

Congress' decision to rely on the complaint process to weed out bad actors reinforces this conclusion. If Congress intended for cable operators to be subject to detailed regulation, it would have required the Commission to establish mechanisms for regular reviews of rates. Instead, Congress determined that it was sufficient to wait for a complaint before examining cable programming service rates. These differences are not merely procedural. Rather, they speak to the fundamental nature of the regulation that Congress intended and demonstrate that cable programming service rates generally are not subject to ongoing regulation.

B. A Benchmark Approach Will Simplify the Processing of Cable Programming Service Rate Complaints While Assuring That Complaints Are Given Adequate Consideration.

While the role of government in overseeing rates for cable programming services is fundamentally different than that envisioned for basic services, the Commission nevertheless can use a comparable mechanism -- benchmarks -- to make initial determinations regarding whether a complaint over rates for cable programming service requires further processing. Benchmarks are well suited to this role because they allow the Commission to identify rate levels which are presumptively not unreasonable, based on factors that are closely related to the costs of providing cable programming service.[45]

The parties that criticize the use of benchmarks for cable programming service are mostly the same ones that insist the Commission must adopt onerous regulation of basic service.[46] They do not provide any meaningful rationale that would justify another regulatory model.

As explained by many other commenters, however, there are many good reasons to adopt a benchmark approach. Benchmarking for cable programming services has all of the advantages of benchmarking for basic service, and it will reduce the administrative burden on the Commission in responding to unfounded complaints.[47] Benchmarking also will permit cable operators to continue their deployment of advanced technology, rather than unnecessarily freezing technological development. As the Telecommunications Industry Association explained, cable has made an important commitment to fiber optics,

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45/ *See* Comments of CVI at 30-36.

46/ *See, e.g.,* Comments of Salisbury, Maryland ("Salisbury") at 12-13, Comments of CFA at 110-12. CFA describes its proposal as a "benchmark," but it has few, if any, of the characteristics of benchmark regulation as described by the Commission.

47/ *See* Comments of CVI at 31, Comments of Adelphia at 104.

and that commitment could be stillborn if unduly restrictive regulation were adopted.48/

As CVI explained in its comments, benchmarking must be adapted to the particular requirements of cable programming services. For instance, a cable programming service benchmark must be based on overall rates for both basic and cable programming services, as well as equipment,49/ and should be adjusted for all the factors that affect basic service as well as for programming costs, rebuilds and other factors that primarily affect cable programming service.50/ Cable programming service benchmarks should not apply to services that are subject to competition, including audio services, bulk sales and services under contract.51/ These adaptations will help to assure that a cable programming

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48/ Comments of Fiber Optics Division, Telecommunications Industry Association at 3-4, 19-22.

49/ CVI's comments described how rates for equipment not subject to effective competition that is used to receive basic service might be regulated. *See* Comments of CVI at 37-39. CVI agrees with the comments of others who state that equipment charges need not be unbundled from cable programming services for the purpose of setting benchmarks. *See, e.g.*, Comments of NCTA at 60. This approach is consistent with the 1992 Act, which requires the Commission to consider "the rates, as a whole" for non-basic tiers, including the charges for equipment. 47 U.S.C. § 543(c)(2)(D).

50/ *See* Comments of CVI at 31-36.

51/ Comments of CVI at 33, n.38. In addition, charges for cable programming service on additional outlets should be deregulated. As Adelphia points out, placing cable programming service on additional televisions is a purely discretionary decision by the consumer, much like adding a second phone line in a residence. Comments of Adelphia at 80. This means that there is little incentive to overprice cable programming service for additional outlets because the price elasticity of demand is much higher than for the initial outlet taking

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service benchmark will provide the necessary guidance to determine if the Commission should conduct a further inquiry after receiving a complaint.

IV. LEASED ACCESS RATE REGULATION

The 1992 Act complicated the regulation of leased access considerably. Even while adding rate regulation provisions, Congress left intact the Commission's obligation to assure that cable operators are not harmed by leased access. The Commission, in adopting its regulations for leased access, must heed that injunction and must, therefore, assure that its leased access rules account for all costs, direct and indirect, of leased access and prevent harmful migration of services from cable programming service to leased access.

First, the amendment to the leased access provisions did not remove the existing requirement to prevent harm to cable operators. Unlike some other parts of the 1992 Cable Act, the leased access provisions did not entirely replace the existing statutory language. Instead, Congress modified the existing language to give the Commission the power to regulate maximum rates and to require the Commission to adopt rules effectuating the amendment.[52/] This left the existing provisions in place, including the Commission's obligation to protect cable

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51/ (...continued)
cable programming service. As a consequence, as long as the rate for additional outlets of cable programming service is at or below the rate for the initial outlet, it should be deemed not unreasonable.

52/ 1992 Act, § 9(b)(2).

operators from the economic harm that could be caused by unreasonable leased access regulations.

As a consequence, the Commission is obligated to consider all of the direct and indirect costs of leased access service to a cable operator. These costs go far beyond the costs of transmitting programming, despite suggestions that the Commission should consider only a limited range of costs.[53/] Of course, the actual cost of accepting leased access programming is the full opportunity cost – what the cable operator forgoes in order to accept the programming. In the case of pay channel services, that cost is the implicit "access fee" for that service – the difference between what the cable operator pays for the service and what it charges its customers,[54/] measured on a per-subscriber basis.[55/] In other cases, particular programming will impose unusual costs on the cable operator, especially if it is delivered in a non-standard fashion or even if it is so offensive that some subscribers cancel their cable service.[56/] Whatever maximum rates the Commission sets, it must account for all of these concerns.

53/ *See* Comments of CFA at 151 (suggesting that maximum rate should be the per channel benchmark rate minus the cost of programming).

54/ For a more detailed explanation of this approach, *see* Comments of Time Warner at 98-102.

55/ Measuring this cost based on the number of subscribers to the cable system is necessary because cable operators cannot be forced to gamble on whether a leased access programmer will be able to achieve significant penetration. Regardless of whether the leased access programmer has 100 percent penetration or gets only a single customer, the costs of a foregone channel to the cable operator remain the same.

56/ *See* Comments of CVI at 43, n.49.

The Commission also must work to prevent migration of existing cable services to leased access. Migration has obvious economic effects on the cable operator, effects which the statute requires the Commission to prevent.[57] At the same time, migration also would subvert Congress' goal of assuring diversity in leased access programming.[58] If existing services can migrate to the reserved leased access channels, then it will be much more difficult for other services to obtain space on cable systems. It is this concern that has led to suggestions that migration be banned.[59] The Commission does not appear to be empowered to adopt a direct ban on migration, but properly-set maximum rates will greatly reduce the risk, both to cable operators and to other potential leased access programmers, that the migration of existing programming will occur.

V. REGULATION OF RATES FOR EQUIPMENT, INSTALLATION AND CHANGES IN SERVICE

The final components of cable service subject to regulation under the 1992 Act are equipment, installation and changes in service that affect basic service. As with other elements of cable service, some parties want the Commission to adopt strict regulations that will prevent cable operators from

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57/ 47 U.S.C. § 532(c).

58/ 47 U.S.C. § 532(a).

59/ *See* Comments of Center for Media Education *et al.* at 33-35.

engaging in normal marketing practices.[60] That is not what Congress wanted, however. Rather, Congress intended only to assure that consumers were protected from unreasonably high charges for equipment, installation and changes in service.[61] The Commission should adopt regulations that recognize the true costs of these elements of cable service, while preserving cable operators' flexibility to market their services effectively through promotions and other means.

A. The Commission Must Not Ignore the Actual Costs of Equipment, Installation and Changes in Service.

The first issue the Commission must consider in designing regulations for equipment, installation and changes in service is what the actual costs for these services are. An overly-narrow view of these costs will lead to

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60/ *See, e.g.,* Comments of CFA at 134-35 (proposing that promotional rates be restricted to prevent recouping the costs of lower equipment and installation rates); Comments of Multiplex Technology, Inc. at 10, 11-12 (proposing cost accounting requirements and a prohibition on promotional equipment and installation rates).

61/ The NCTA explains in detail how the equipment and installation provisions were intended to protect consumers from excessive charges for equipment used to receive basic service. Comments of NCTA at 44-54. Regulations designed to meet this congressional objective need not restrain cable operators' ability to market their services effectively. Congress also intended only to govern the costs of additional outlets used for basic service, as is evidenced by the inclusion of the additional outlet provision under the subsection of the 1992 Act dealing with basic service. *See* 47 U.S.C. § 543(b). As discussed in Part III(B), *supra*, rates for cable programming service on additional outlets should not be subject to rate regulation.

underpricing, and will prevent cable operators from obtaining the reasonable return mandated by the 1992 Act.[62]

As described in CVI's comments, there are many costs associated with any element of cable service. CVI listed nineteen different cost elements for equipment, and some costs were omitted in the interests of brevity.[63] These same cost elements, among others, apply to installation. Similarly, changes in service and the provision of additional outlets have their own distinct costs, many of which are not evident at first glance. For instance, additional outlets can require the cable operator to install new equipment, including amplifiers, to handle the additional load created by the outlets.[64]

Failure to take any of these costs into account will force the cable operator to shift them to other parts of its operations. Thus, any suggestion that only "direct" costs should be counted in determining maximum rates for equipment, installation and changes in service will, at best, result only in

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62/ *See generally* 47 U.S.C. § 543(b).

63/ Comments of CVI at 39, n.44.

64/ NATOA implies, on the other hand, that additional outlets impose little or no cost. Comments of NATOA at 50-51. This is factually incorrect, as described above, and logically incorrect as well. Additional outlets create a heavier load on the cable system, requiring greater signal strength at any given point in the system. There obviously are costs associated with this heavier load. The effect of NATOA's approach would be to make households with additional outlets free riders, with the costs of additional outlets spread among all cable users, including the large number of consumers who do not purchase additional outlets.

increased prices for basic service and cable programming service.[65] More likely, excluding any relevant costs from the consideration of the maximum prices will prevent cable operators from obtaining a reasonable return on these elements of cable service, despite the requirements of the 1992 Act.

Finally, there is no evidence that Congress intended to exclude any costs from rate determinations for equipment, installation and changes in service. In fact, the House Report specifies that the term "actual cost" is intended to include "normal business costs."[66] This gives the Commission the discretion to determine that all costs, direct and indirect, are properly considered in designing the regulations for equipment, installation and changes in service. Since all costs are relevant to the question of what rates are reasonable, the Commission should include them.

65/ *See* Comments of CFA at 132 (no joint and common costs should be allocated to equipment). CFA argues that forbidding allocation of joint and common costs to equipment would be consonant with Congress' intent to foster competition in the equipment market. As NCTA demonstrated, the equipment rate regulation provisions are intended to protect consumers from excessive rates, not to have any effect on equipment competition. Comments of NCTA at 46-47. Moreover, excluding joint and common costs would have the effect of lowering the maximum price a cable operator could charge for equipment, which actually would make it more difficult for equipment competitors to emerge. CFA's proposal contradicts not only its own premise, but the position of the equipment manufacturers, who presumably want more, not less, competition. *See* Comments of Consumer Electronics Group of the Electronic Industry Association ("EIA") at 7.

66/ House Report at 83.

B. The Commission's Regulations Should Permit Cable Operators to Market Their Services Effectively.

Well-designed regulation of rates for equipment, installation and changes in service will recognize that cable operators need flexibility to market their services effectively. Flexibility inures to the benefit of consumers and cable operators alike because it will permit more consumers to obtain cable service at reasonable costs. Thus, the public interest objectives of the 1992 Act will be advanced by assuring flexibility.

Pricing flexibility is particularly useful because it will help to promote economic efficiency in the offering of cable service. It is notable that cable operators, the only parties with any actual experience in marketing cable service, uniformly endorsed the need for flexibility.[67/] Promotional installation rates, for instance, increase cable's attractiveness and the addition of new subscribers permits the cable operator to spread the costs of operation over a greater number of customers, enhancing the efficiency of operation.[68/] This increased efficiency obviously benefits the cable operator, but it also will result in lower rates, better programming and better service to subscribers as well.

On the other hand, cable operators also should be permitted the flexibility to assure that subscribers do not abuse promotional offerings. As

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67/ *See, e.g.*, Comments of Blade Communications *et al.* ("Blade") at 11, Comments of Nashoba Communications Limited Partnership ("Nashoba") at 75-76. Even CFA concedes that promotional rates can be reasonable. Comments of CFA at 134.

68/ *Notice* at ¶ 70.

described in CVI's comments, change charges sometimes are used to recoup costs that otherwise would have been recovered when service first began, e.g., when a subscriber, after one month of service, disconnects a particular service that was part of a low-cost installation promotion. In these circumstances, a change charge represents the only way to recoup the actual costs of the entire transaction.[69/]

Some parties argue against pricing flexibility because they fear cross-subsidization.[70/] There is little likelihood of cross-subsidy because cross-subsidization is unlikely to pay off in the long run. Prices for equipment, installation and changes that do not, on average, recover all costs cannot be sustained. Moreover, if a cable operator undercharges for some equipment and overcharges for other equipment to make up the difference, the net result will be only to encourage competition for the overpriced good. For instance, any cable operator that overprices remote controls is likely to be disciplined by the broader, highly-competitive market for universal remote controls.

The way to assure the flexibility that cable operators need to market their services while protecting consumers is to adopt a "basket" approach for rates for equipment, installation and changes in service. As the NCTA explains, the Commission should determine that the individual rates for these elements of cable service are not important so long as the combined rates "do not

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69/ *See* Comments of CVI at 40-41. As noted in CVI's comments, this practice is common in other industries.

70/ Comments of BellSouth at 20-21, Comments of EIA at 7.

exceed actual costs plus a reasonable profit."[71] The basket approach is particularly appropriate for these elements of cable service because they are closely related. For instance, as described above, a change charge may be intended to recover installation costs when a subscriber has abused a promotional offering. The basket approach also will simplify the Commission's regulation of these elements of cable service while remaining true to the requirements of the 1992 Act.

VI. APPROACHES TO RATE REGULATION

A. Effective Competition Standards.

1. The Commission Should Implement a Cumulative 15 Percent Penetration Test.

Several commenters have argued that the 15 percent subscriber penetration test for effective competition should not be measured on a cumulative basis.[72] Under this theory a cable operator would remain subject to rate regulation until and unless a single other multichannel video programming distributor achieved a 15 percent penetration level, no matter how many other distributors also provide competing services and even if the combined subscriber base of all those services exceeded that of the cable operator. The

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71/ Comments of NCTA at 51-55, 55.

72/ *See, e.g.*, Comments of NATOA at 10, Comments of Municipalities at 12-13.

"noncumulative" approach to the effective competition test is inconsistent with Congressional intent and should not be adopted.

The effective competition test was intended to ensure that the rates of a cable operator not subject to competition from other service providers would be subject to regulation as a check against possible artificially high rates. Congress adopted the subscriber penetration test as a means of identifying the point when competition from other multichannel video provider distributors is sufficient to constrain prices through marketplace forces. Congress set that point at 15 percent, thereby relieving a cable operator of rate regulation if more than 15 percent of the households in the franchise area are served by multichannel video programming distributors. 47 U.S.C. § 543(l)(1)(B)(ii). The focus of the effective competition standard is on the availability of any other service, not just any other individual service. The competition offered by a single provider with 15 percent penetration has the same effect as competition offered by multiple providers with a cumulative 15 percent penetration rate. In fact, the more providers in a franchise area, the more choices are available to subscribers. Therefore, the purpose of the effective competition standard is met by using the cumulative approach.

NATOA bases its contorted argument for a noncumulative approach not on the statutory language, but on inartful language in the Conference Report. It is stated that "effective competition means . . . the franchise area[] is served by at least two unaffiliated multichannel video programming distributors . . . and at least 15 percent of the households in the franchise area subscribe to the smaller of these two systems."[73] By focusing only on the latter clause of this statement NATOA concludes that the 15 percent test is noncumulative. Taken alone, the Conference Report language is ambiguous,[74] although the statutory language is not.[75] In any event, under NATOA's approach, a cable system which finds itself competing against a DBS service and a wireless operator that each enjoyed a 14 percent subscriber penetration level in the franchise area (or an accumulated penetration of 28 percent), would still be subject to rate regulation. However, a system confronting a single competitor that served just over 15 percent of the households, would not be regulated. As a matter of policy this anomalous result makes no sense.

Section 623(l)(1)(B)(ii) provides that "the number of households subscribing to programming services offered by multichannel video programming distributors exceeds 15 percent . . . ."[76] Because the 1992 Act refers to distributors in the plural, Congress intended to apply a cumulative formula to the effective competition calculation.[77]

73/ Conference Report at 62 (emphasis added).

74/ The second clause of the sentence is inconsistent with the first because it assumes that there are only two distributors (the cable operator and one other provider), without leaving open the possibility of more than two distributors in a franchise area (as the first clause suggests).

75/ The clarity of the statutory language renders unnecessary and inappropriate NATOA's resort to the language of the Conference Report. *See infra* pp. 33-34.

76/ 47 U.S.C. § 543(l)(1)(B)(ii) (emphasis added).

77/ *See* Comments of Tele-Communications, Inc. ("TCI") at 12-13 ("If Congress
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This is consistent with past policy as well. Section 76.33 of the Commission cable television regulations provides that, "[t]he penetration of alternative video delivery services will be calculated by combining the number of subscribers to all available services . . . ."[78] This cumulative approach defines the actual availability of competition in a franchise area: The Commission expressed this opinion in an earlier proceeding on the effective competition standard:

> "[The Commission] believes that it is appropriate to consider whether each home passed by the incumbent cable system has available to it a substitute service and whether or not it chooses to subscribe to an alternative . . . . Thus, to determine the availability of competing video services, the number of homes passed by at least one of these alternative delivery services should be totalled.[79]

This language expresses the Commission's clear intent to calculate penetration by accounting for all homes passed by at least one of any alternative service.

77/ (...continued)
sought to require each multichannel video programming distributor to reach a 15 percent penetration level in order to satisfy the statutory burden, it would not have used the plural form of the term 'distributor'"(emphasis added)).

Senate floor debate on the issue supports this interpretation as well. In the colloquy between Senators Lieberman and Inouye, Senator Lieberman posed the example of two DBS providers, each of whom provides service to 10 percent of the households in a franchise area. One of the DBS providers is affiliated with the cable operator, who serves 80 percent of the homes. Senator Inouye confirms that because one of the DBS providers is affiliated with the cable operator, the 15 percent penetration test is not met. 138 Cong. Rec. S14,253 (daily ed. Sept. 21, 1992).

78/ 47 C.F.R. § 76.33(a)(2)(ii) (emphasis added).

79/ Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, *Report and Order and Second Further Notice of Proposed Rulemaking*, 6 FCC Rcd 4545, 4554 (1991).

In the *Notice* the Commission also asked when competition from alternate providers should be deemed "offered." At issue is the "availability" of the service to a potential subscriber.[80] NATOA suggests that the availability requirement be subject to superfluous conditions, such as the active marketing of the competitor's product.[81] This is unnecessary; it is reasonable to assume that any competing multichannel video programming distributor would broadly advertise its services throughout its service area to attract subscribers. The issue, moreover, is not the degree to which multichannel video providers are marketing their services, but rather the penetration levels that they are achieving. Once the penetration level passes the 15 percent mark and services are technically available, it is a reasonable assumption that they are marketed adequately.

2. Definition of A Multichannel Video Programming Distributor Should be Broad.

Several commenters suggest that, for purposes of effective competition, the definition of "multichannel video programming distributor" be restricted to services that offer a certain minimum number of channels to subscribers or services that are similar to those offered by operators.[82] The definition of an multichannel video programming distributor should be broad, and not restricted to service providers that offer the same or more programming as

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80/ *Notice* at ¶ 8.

81/ Comments of NATOA at 15-16.

82/ Comments of National Association of Broadcasters 12-13, Comments of InterMedia Partners at 3-5.

the cable operator. The 1992 Act requires that the provider offer "comparable video programming," without specifying that a minimum number of channels should be considered in the effective competition calculus.[83] Effective competition does not require the availability of fully substitutable services. Total duplication would not serve Congress' longstanding interest in promoting diversity and choice. Some subscribers to a 54-channel cable service may even prefer a competing eight or ten channel service so long as the programming offered served their particular needs and interests.[84]

NATOA suggests that effective competition from video dialtone providers be conditioned on whether they are subject to franchise regulations. There is absolutely no reason to impose this condition.[85] Although the telephone company providing the video dialtone service or the programmer should be subject to franchising requirements, effective competition should not be conditioned on whether the provider is subject to these requirements.

83/ 47 U.S.C. § 543(l)(b). The definition of multichannel video programming distributor specifically includes (but is not limited to) cable operators, multichannel multipoint distribution services, DBS and television receive-only satellite program distributors regardless of the number of channels available from any of them. 47 U.S.C. § 531(12).

84/ Similarly, some subscribers may find a satisfactory alternative in even a handful of programming options provided via a video dialtone facility.

85/ DBS and wireless providers are not subject to franchising requirements, yet this fact has nothing to do with whether the service they provide meets the effective competition test.

3. Cable Operators Do Not Have the Burden of Proving the Presence of Effective Competition.

Several commenters suggest that the operator have the burden to demonstrate the presence of effective competition.[86] Specifically, NATOA argues that the operator should retain the data demonstrating its penetration level, the number of households it serves and other matters relevant to determining whether effective competition exists. But the burden of demonstrating the presence or absence of effective competition cannot be applied at whim. By federal law, rate regulation of cable services is forbidden unless the Commission finds that a cable system is not subject to effective competition.[87] The Commission, as a predicate for rate regulation, must initially determine that effective competition does not exist. To assist the Commission in this task, however, CVI agrees with NATOA that other multichannel video programming distributors should be required to provide all relevant information to the Commission so that all parties will be able to determine whether effective competition exists.[88]

86/ Comments of NATOA at 25, Comments of City of San Diego at 5, Comments of Greater Grand Rapids Area Cable Commission and Cities of New Ulm, Minnesota and Savage, Minnesota ("Grand Rapids") at 16-17, Comments of City of Rocky Mount, North Carolina at 2.

87/ *See* 47 U.S.C. § 543(a). Commission rules on leased commercial access are the only exception. 47 U.S.C. § 532.

88/ Comments of NATOA at 26, n.10 and accompanying text.

B. Composition of the Basic Tier and Basic Buy-Through.

The Attorneys General of Pennsylvania, Massachusetts, New York, Ohio and Texas argue that the composition of the basic tier should be at least comparable to the basic tier offered by the operator as of January 1, 1992.[89/] This proposal is contrary to the 1992 Act's mandate, which requires a basic tier to include only PEG, must carry signals, and non-satellite broadcast signals provided to any subscriber.[90/] Certainly the basic tier may be augmented by "additional video programming signals or services" at the option of the cable operator, but nothing in the 1992 Act or its legislative history requires a cable operator to provide greater than minimum programming on the basic tier.[91/] Such additions may increase costs and frustrate the main purpose of the basic tier: to provide a low cost tier of service in the public interest.

Several commenters have argued that subscription to the basic tier of service must be a prerequisite to taking any other services, including a la carte offerings. The New York State Commission on Cable Television, ("NYSCCT") states, for example, that the 1992 Act precludes the offering of services on a stand alone or a la carte basis without subscription to the entry level basic tier.[92/]

89/ Comments of Attorneys General of Pennsylvania, Massachusetts, New York, Ohio and Texas ("Attorneys General") at 11.

90/ 47 U.S.C. § 543(b)(7).

91/ *Id.*

92/ Comments of NYSCCT at 13-14. *See also* Comments of City of Miami Beach, Florida at 7, Comments of Village of Schaumburg, Illinois at 3.

These commenters also argue that the term "service tier" is not restricted to a category of service that offers more than one video programming service.[93/] However, NYSCCT provides no support for this interpretation. Had Congress intended subscription to the basic tier to be a prerequisite to all other video programming services then the language of Section 623(b)(7)(A) would have been different. The statute is clear that "[e]ach cable operator . . . shall provide its subscribers a separately available basic tier to which subscription is required for access to any other tier of service."[94/] A la carte services that stand alone, such as pay-per-view or premium services, have never constituted a "tier." Nor, for that matter, was it Congress' interest to restrict the ability of cable operators to compete with other multichannel video programming distributors that offer programming on an a la carte basis.

VII. JURISDICTION TO REGULATE BASIC RATES

A. The Commission Has Limited Jurisdiction to Regulate Basic Rates.

Several parties contend that the Commission may regulate rates when a franchising authority does not file for certification, withdraws its certification voluntarily, or requests assistance from the Commission to regulate

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93/ "Although the term 'cable programming service' is defined in Section 623(l)(2) in such a manner as to preclude services offered on a per-channel or per-program basis, it is not defined in any way that would be inconsistent with the conclusion that a service sold on a per-channel basis could constitute a single tier." Comments of NYSCCT at 13.

94/ 47 U.S.C. § 543(b)(7)(A) (emphasis added).

rates.[95] For instance, CFA asserts that Section 623(b) of the 1992 Act grants the Commission jurisdiction over basic service rates and refers to the Conference and Senate Reports as support for this proposition.[96] The Conference Report, however, merely reiterates the provisions in Section 623(b), noting that the Commission must impose regulations to ensure that basic service rates are reasonable.[97] Nowhere does the language of the Conference Report suggest an intention to grant the Commission the same regulatory jurisdiction given to a franchise authority. On the other hand, the Conference Report language does reiterate the Commission's responsibility to "choose the best method" of regulation to ensure that rates for basic cable services are reasonable.

CFA also refers to the Senate Report in support of its position.[98] However, Section 623(b) was adopted from the House bill, H.R. 4850, not the Senate bill, S. 12. Adoption of the House language not only moots any contrary language in the Senate version, it specifically invalidates any accompanying legislative history. Indeed if any prior legislative discussion is to be given weight

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95/ Comments of NATOA at 19-23, Comments of Grand Rapids at 15-16, Comments of CFA at 122-30, Comments of Metropolitan Dade County, Florida ("Dade County") at 1-5, Comments of Metropolitan Area Communications Commission, on behhalf of Washington County, Oregon, and the cities of, Banks, Beaverton, Cornelius, Durham, Forest Grove, Gaston, Hillsboro, King City, Lake Oswego, North Plains, Rivergrove, Sherwood, Tigard, Tualatin, and Wilsonville at 3-4.

96/ Comments of CFA at 123-24.

97/ *See* Comments of CFA at 124, *citing* Conference Report at 62.

98/ Comments of CFA at 125, nn.118-19.